

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BERNARD AND KATHRYN B. (DECEASED) NEWMAN	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 814584
Refund of New York State and New York City	:	
Income Taxes under Articles 22 and 30 of the	:	
Tax Law for the Years 1984, 1985 and 1986.	:	

Petitioners, Bernard and Kathryn B. Newman, 25 East 9th Street, New York, New York 10003, filed a petition for refund of personal income taxes under Articles 22 and 30 of the Tax Law for the years 1984, 1985 and 1986.

The Division of Taxation, represented by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., of counsel), filed a motion for summary determination, dated May 2, 1996, in the above-captioned case. Petitioners, represented by Kostelanetz & Fink, LLP (Kevin M. Flynn, of counsel) filed a cross motion for summary determination dated July 3, 1996. Pursuant to 20 NYCRR 3000.5(b), responding papers were due on August 2, 1996. Based on the affidavits of Herbert M. Friedman, Charles Bellamy, and Kevin M. Flynn, and the documents attached thereto, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

I. Whether petitioners' refund claim for taxes paid on Federal pension income is barred by the three-year limitations period of Tax Law § 687(a).

II. Whether petitioners are entitled to tax refunds based on the special refund authority of Tax Law § 697(d).

FINDINGS OF FACT

1. Petitioners filed New York State and City personal income tax returns for the years 1984, 1985 and 1986 on or before April 15, 1985, April 15, 1986 and April 15, 1987, respectively. They reported and paid State and City tax, pursuant to Tax Law § 612(c)(3), in the amounts of \$3,000.00, \$3,408.00, and \$3,766.00 with respect to Federal pension income.

2. In 1989, the United States Supreme Court held in Davis v. Michigan Department of Treasury (489 U.S. 803) that a State tax scheme that exempted from tax State retirement benefits, but not Federal retirement benefits, violated the constitutional intergovernmental tax immunity doctrine. Thereafter, in April of 1991, petitioners filed a refund claim for taxes paid on the Federal retirement benefits for the years 1984, 1985 and 1986.

3. The Division of Taxation sent to petitioners a Notice of Disallowance, dated August 29, 1994, denying the refund claim because it was not filed within three years from the time the returns were filed as required under Tax Law § 687(a).

4. After a conciliation conference was held, the conferee issued a conciliation order, dated September 15, 1995, sustaining the statutory notice.

5. Petitioners filed a petition, dated December 12, 1995, protesting the conciliation order. The Division filed an answer, dated March 6, 1996, stating that petitioners failed to file a refund claim within three years of the filing of their income tax returns; that Governor Cuomo's 1994 decision to approve refund claims for those who paid State tax on their Federal pension income was solely limited to those who had filed timely refund claims under Tax Law § 687; and that the application of Tax Law § 697(d) is discretionary in nature and that, in any event, petitioners did not meet the threshold requirements for its application.

6. In its motion for summary determination, the Division of Taxation argues that there are no material and triable issues of fact and that, as a matter of law, the petition should be denied.

7. In their cross motion for summary determination, petitioners argue that when they filed their returns for the years 1984 through 1986, they followed the letter of the law as it then existed; that the law was not rendered unconstitutional until the Davis decision in 1989; that the retroactive application of Davis was not established until the Court decided Harper v. Virginia Department of Taxation (509 US __, 125 L Ed 2d 74) in 1993 when the time had lapsed for petitioners to file refund claims under Tax Law § 687(a); that the State must guarantee a taxpayer a "meaningful" retrospective relief to rectify an unconstitutional law; that the Division of Taxation's position "inexplicably penalizes" petitioners for not anticipating that Tax Law § 612(c)(3) would be declared unconstitutional and denies petitioners "a fair opportunity to contest a patently unconstitutional tax statute"; and that Tax Law § 697(d) was enacted to provide relief to taxpayers who were improperly required to pay taxes under an illegal tax statute, and therefore, it would be arbitrary, capricious and inconsistent with the constitutional principles enunciated in Davis and its progeny to deny petitioners' refund under section 697(d).

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b) after issue has been joined. The regulations provide that the motion may be granted if the movant has sufficiently established that no material and triable issue of fact is present, and the motion may be denied "if any party shows facts sufficient to require a hearing of any material and triable issue of fact." From the motion papers, it is apparent that there are no material or triable issues of fact. Therefore, the legal issues may be decided on these motions.

B. As noted above, in Davis v. Michigan Dept. of Treasury (*supra*), the United States Supreme Court held that a tax scheme that exempts from tax retirement benefits paid by the State but not retirement benefits paid by the Federal government is unconstitutionally discriminatory. In Harper v. Virginia Dept. of Taxation (509 US __, 125 L Ed 2d 74 [1993]), the U.S. Supreme Court further held that the ruling in Davis applies retroactively and that States which violated the tax immunity doctrine must provide a "meaningful backward-looking relief to rectify any unconstitutional deprivation" (*id.*, 125 L Ed 2d at 89, *quoting*, McKesson Corp. v.

Division of Alcohol Beverages & Tobacco, 496 US 18, 31, 110 L Ed 2d 17 [1990]). A State may provide such relief by awarding refunds to those illegally taxed or provide some other relief that "create[s] in hindsight a nondiscriminatory scheme" (McKesson Corp. v. Division of Alcohol Beverages & Tobacco, *supra*, 496 US at 40). Applying this principle, the U.S Supreme Court found that the State of Georgia had not provided a taxpayer "meaningful backward-looking relief" when it construed a refund statute not to apply to the taxpayer on the ground that the law under which taxes were assessed and collected was subsequently declared unconstitutional (Reich v. Collins, 513 US __, 130 L Ed 2d 454 [1994]).

In this case, the three-year statute of limitations provision of the refund statute, Tax Law § 687(a), was applied to bar petitioners' request for a refund. Postdeprivation remedies, such as refund statutes, must satisfy minimum due process requirements, however, the State is free to impose various procedural requirements for postdeprivation relief including the enforcement of a statute of limitations provision (McKesson v. Division of Alcoholic Beverages & Tobacco, *supra*, 496 US, at 45). In McKesson, the Court indicated that the purpose of such procedural protections was "to secure the State's interest in stable fiscal planning when weighted against its constitutional obligation to provide relief for an unlawful tax" (*id.*, at 45, *citing*, Ward v. Love County Board of Commrs., 253 US 17, 25, 64 L Ed 2d 751).

Thus, although petitioners are correct to note that they could not anticipate that the taxing statute, with which they complied, would subsequently be declared unconstitutional, the Division of Taxation's denial of the refund for 1985 on the ground that it was barred by the three-year statute of limitations contained in Tax Law § 687(a) is consistent with the U.S. Supreme Court decisions in Davis and its progeny. Notwithstanding this three-year limitations provision, section 687(a) provides a postdeprivation remedy, the application of which is meaningful and nondiscriminatory. Therefore, summary determination in favor of the Division of Taxation is granted on this issue.

C. Petitioners next argue that they are entitled to a refund under the special refund authority of Tax Law § 697(d). Section 697(d) provides that

"[w]here no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

The Tax Appeals Tribunal addressed the special refund authority under Tax Law § 697(d) in Matter of the Estate of Mackay (Tax Appeals Tribunal, March 23, 1989). In that case, Mr. Mackay received record royalties for the years 1951 through 1979 pursuant to an agreement with Helen D. Miller, the widow of Glenn Miller. Subsequent to Helen Miller's death, a court action was brought against Mr. Mackay for return of all royalties paid. In accordance with a final decision by the New Jersey State Court, the estate of Mr. Mackay paid to the estate of Helen Miller certain sums of money based on the Court's interpretation of the royalty contract at issue. The estate of Mackay thereafter sought a refund of an overpayment of income tax based on the royalties and commissions the Mackay estate was ordered to repay to the Miller estate. The Tax Appeals Tribunal held that the refund could not be made pursuant to section 697(d) because the Mackay estate's entitlement to retain the income from the commissions and royalties was a question of law resolved by the New Jersey Court and that payments made due to the wrong construction of the terms of a contract was a mistake of law and not a mistake of fact. In reaching this decision, the Tribunal set forth the following legal standard:

"A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are (54 Am Jur 2d Mistake, Accident or Surprise § 4; Wendell Foundation v. Moredall Realty Corp., 176 Misc. 1006, 1009). A mistake of law, on the other hand, has been defined as acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts (54 Am Jur 2d Mistake, Accident or Surprise § 8; Wendell Foundation v. Moredall Realty Corp., supra, at 1009)."

Petitioners' payment of the income tax for which they seek refund was based on a law that was subsequently declared unconstitutional. Thus, petitioners' belated refund request involved a mistake of law and not a mistake as to the existence or nonexistence of the underlying material facts (see, Matter of Fiduciary Trust Co. of N.Y. v. State Tax Commn., 120 AD2d 848, 502

NYS2d 119 [special refund authority does not apply with respect to a mistake of law relating to the constitutionality of a retroactive provision in a statute]; Mercury Machine Importing Corp. v. City of New York, 3 NY2d 418, 165 NYS2d 517 [taxes illegally levied under a law involves a mistake of law]). Therefore, the special refund authority is not applicable.

D. The Division of Taxation's motion for summary determination is granted, and the cross motion for summary determination and petition of Bernard and Katheryn B. Newman are denied.

DATED: Troy, New York
October 24, 1996

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE